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Seduction in Wonderland: The Need For a Seller's Fiduciary Duty Toward Children

By SIDNEY M. WOLINSKY*

AND

JANET ECONOME**

Picture men in an underground cavedwelling . . . from their childhood, their legs and necks in chains, so that they stay where they are and look only in front of them . . . [while] a fire is burning behind them

[D]o you think that such men would have seen anything of themselves or of each other except the shadows thrown by the fire on the wall of the cave opposite to them?

[I]f they were able to talk with one another, do you not think that they would suppose what they saw to be the real things?¹

A child's perception of the world, like that of Plato's cavedweller, is both unique and limited. Very young children are unable to distinguish fact from fantasy and really believe that the sun follows them when they go for a walk, that anything that moves is alive, and that dreams come from the sky.² As children grow they gradually learn to discriminate in an adult fashion, but not until adolescence does a child's perception of reality correspond substantially to that of an adult.

Each year sellers³ of goods, mainly toys, cereals, candy, and snack foods, produced primarily for children, invade the child's fragile "wonder-

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** Member, second year class. We would like to give special thanks to Tim Manolis, cartoonist.

1. THE REPUBLIC OF PLATO 256-57 (A. Lindsay trans. 1957).

2. M. PULASKI, UNDERSTANDING PIAGET 38-52 (1971).

3. In this article, "seller" is often used in the collective sense to refer to all those persons who are responsible for the marketing, advertising, and manufacturing of children's products.

land'' to sell their merchandise. Manufacturers spend up to \$100 million per year on television advertising.⁴ They carefully prepare their campaigns well in advance by employing a battery of Ph.D. certificated child psychologists and market researchers to discover which products sell to children and how to sell them. They then hire skilled advertisers, who capitalize on a child's inability to distinguish fact from fantasy by depicting the various products in magic environments where cartoon characters co-exist with human beings and by creating advertisements that depend for their appeal on color, design, slogans, and fun. Rarely is the intrinsic merit of the product mentioned. Sellers then beam the advertisement, the net result of hundreds of years of higher education, years of planning, and numerous hours of preparation, through the powerful medium of television into the minds and emotions of receptive children. The cumulative effect of this expertise creates the child's reality for the brief thirty seconds that his mind is focused on the television screen.⁵

The market for children's products is lucrative⁶ and ever-expanding. Remarkably, measures protecting youth from this type of commercial exploitation have not developed proportionately, although the process described above seems a classical example of overreaching. The law has traditionally afforded extra protection for the rights of children in many relationships, in recognition of their special vulnerability and naïveté. Today, with the burgeoning market for children's products and the proliferation of advertisements bombarding children, it is desirable, indeed essential, for the courts to act to protect children by insuring that sellers take the additional care necessary to treat children with sensitivity. Adequate protection for children cannot be afforded by piecemeal adjudication condemning specific instances of abusive conduct after it has occurred. Rather, a comprehensive legal theory delineating the standard of care sellers must exercise is needed to prevent abuse of children in the marketplace.

It is the thesis of this commentary that courts should recognize that advertisers and other commercial enterprises that deliberately seek to induce children to buy or use their products stand in a fiduciary relationship to such children or to those who purchase goods on their behalf. To date, courts have not explicitly recognized this fiduciary relationship. Yet no situation

4. *Paying for Playthings, Counting Commercials & Consumers: ACTION FOR CHILDREN'S TELEVISION NEWS*, at 6, Fall 1976 [hereinafter cited as *Paying for Playthings*].

5. Much of the persuasiveness of commercials is visual and is impossible to describe in words. In order to sense some of the impact of these advertisements on children, the reader should spend an early Saturday morning in front of the television.

6. *Paying for Playthings*, *supra* note 4, at 6. Retail spending in 1975 for toys alone averaged \$4.8 billion.

could more dramatically require application of the ancient principles inherent in the fiduciary concept: a seller with far superior knowledge, control, and expertise, reaching out with this power to exploit the less experienced, less educated, trusting, and impressionable child.

This commentary examines the inequities of the seller-child relationship and the inadequate extrajudicial solutions that groups have recommended in response to this problem. A discussion of the strong public policy affording special treatment to children in other areas of the law and to other inequitable relationships suggests the fiduciary doctrine as the necessary and appropriate legal remedy. After outlining the doctrine, its obligations, and remedies, this commentary explores the general benefits to be gained and the specific constitutionally protected interests that would be furthered by the application of the fiduciary doctrine to the seller-child relationship.

I. The Problem: The Seller and the Child Dealing in the Marketplace

A. The Child

Because of their inadequate experience and underdeveloped intellect, and their limited access to knowledge of the design, manufacture, and capabilities of commercial products, children are especially vulnerable in the commercial world. A child under twelve years of age has had, at most, eight years of elementary education, five to seven hours a day, and has spent an equal if not greater amount of time with indiscriminating eyes fastened on the television screen.⁷ As much as three-fifths of this viewing time is consumed by advertisements directed at children.⁸

The eminent child psychologist Piaget determined that a young child seems unable to distinguish fact from fantasy.⁹ This observation is illustrated by a child's concept of the origin of the sun and the moon. Only upon reaching the age of twelve years does the average child attribute the sun's formation to natural processes in which human or divine agents have no role.¹⁰ Piaget also observed that until the age of seven, a youngster is totally egocentric and incapable of manipulating data and experience. He found that the young child truly believes that when the same amount of water is poured from a wider to a narrower container, the water increases in quantity. The

7. Elias, *How to Win Friends and Influence Kids on Television*, HUMAN BEHAVIOR, Apr. 1974, at 18 [hereinafter cited as Elias].

8. Bever, *Young Viewers' Troubling Response to TV Ads*, HARV. BUS. REV., Nov.-Dec. 1975, at 109 [hereinafter cited as Bever].

9. See generally H. GINSBURG & S. OPPER, *PIAGET'S THEORY OF INTELLECTUAL DEVELOPMENT* (1969).

10. *Id.* at 99.

seven to ten year old begins to understand the difference between fact and fantasy in the abstract but does not have reasoning skills to differentiate between the two in concrete terms. Only after reaching the age of twelve is the average child able to analyze a problem before acting on it.¹¹

On a typical Saturday morning a child may see someone just like himself on television with Dracula in the background devouring the youngster's breakfast cereal and claiming that there is "adventure in every bowl." In the next commercial a tiny doll might be flashed in the foreground of the television screen so that it looks larger than life. Following this distortion, the child viewer might be shown live footage of an authentic car race, complete with the hum of car engines in the background. The scene magically blends into a living room where children play with their "real" race car set. Of course, the hum of the engines continues throughout the advertisement. A television viewer under the age of seven simply cannot discriminate between the objective and informational aspects of these various commercials and the parts that exaggerate the product's characteristics by illusion. Many children simply believe what they see, or what they think they see; all of the typical advertisements described above might be termed misleading from a child's point of view, in that they represent characteristics of the product that do not exist and do not result from its purchase. In fact, over ninety percent of the mothers surveyed in a recent study said their children believed that products advertised on television actually have the characteristics depicted.¹² Misleading commercials are also harmful for seven to ten year old children. At this age they are able to realize theoretically that something deceptive is occurring in commercials but still cannot distinguish fantastic from factual claims under apparently real circumstances. Naturally children become frustrated and angry at their inability to recognize such deceit. At least one observer has found that children of this age group, having been disappointed by advertisements, often turn into "little skeptics," believing that all advertising, and by analogy all adult society, is deceitful. "This shows him that society allows for *institutional* hypocrisy, a fact that violates moral precepts he has been taught as a young child."¹³

Even the small percentage of children who recognize the fantasy elements in commercials cannot objectively judge the merits of the advertised product because they have extremely limited access to knowledge about the product. There is barely enough time in a fleeting thirty-second commercial to present the product visually and to expound its "fun" qualities. These

11. *Id.* at 219.

12. Elias, *supra* note 7, at 20.

13. Bever, *supra* note 8, at 116.

market considerations provide disincentives to disclose price, materials, physical dimensions, operational procedures, or product warnings. On the other hand, the seller has every incentive to exaggerate falsely the size, speed, and sturdiness of the product. Product packaging often insures that the child as well as the parent remain in total ignorance of a product's characteristics. For example, cereal boxes do not disclose what percentage of their content is sugar. Similarly, toy packages in the store are usually sealed, ostensibly to prevent tampering. Because of this concealment, the innocent child has no way to discover that a sturdy looking launcher on a toy aircraft carrier is merely a rubber band¹⁴ until he has paid twenty dollars and the seller has made a profit. This limited access to knowledge minimizes a child's opportunity to make objective consumer judgments. Moreover, children are not full participants in society's decision-making process.¹⁵ They do not have financial power to invest or keep their own wages, they cannot vote, and they are not organized into interest groups per se; nor do they have any political clout or power to protect themselves by legislation or consumer action.¹⁶ There has been a slowly growing recognition of the need to establish and enforce children's rights, but at present, young children, of necessity, must trust and depend on adult society to insure the protection of these rights.

B. The Seller

Manufacturers and advertisers of children's products rarely respect the unique attributes of children unless these attributes aid product sales. With full knowledge of a child's vulnerability, these sellers utilize their vastly superior resources, knowledge, and manipulative power to reach out with a sophisticated advertising message in a deliberate attempt to make a child feel his world is incomplete without the advertised item. As indicated above, the manufacturer of children's products uses enormous financial resources to employ an army of professionals to gauge children's reactions to products and commercials.¹⁷ Children are tested in laboratory conditions to determine target weaknesses in the child's psyche that can be manipulated for financial gain: "[T]he tiny guinea pigs then act out how their parents are likely to react to their request for this product, what 'pitches' they themselves would

14. This practice is illustrated by comparing the commercial for "Flying Aces Attack Carrier" by Mattel with the product itself.

15. See Sugarman & Kirp, *Rethinking Collective Responsibility for Education*, 39 L. & CONTEMP. PROB. 144, 166 (1975).

16. See text accompanying notes 80-91 *infra*.

17. M. HELITZER & C. HEYEL, *THE YOUTH MARKET: ITS DIMENSIONS, INFLUENCE, AND OPPORTUNITIES FOR YOU* 142 (1970) [hereinafter cited as HELITZER & HEYEL].

use on adults and how playmates would feel about the product.”¹⁸ Because the potential profit in the children’s industry is rising,¹⁹ marketing, advertising, testing, and manipulative techniques have become more refined. Advertisers now divide children into sub-classes consisting of infants (through age two), preschoolers (three to four years), primary grades (five to eight years), and pre-teens (seven to twelve years). The precise characteristics of each class are identified so that a sales pitch most likely to affect the target age group can be developed.²⁰ Moreover, after financing the development of children’s products, manufacturers spend over \$400 million a year to advertise these products through the influential medium of television.²¹

Corporate manufacturers and advertising agencies are fully aware of children’s differences in perceptual ability and their difficulty in engaging in rational analysis.²² They intentionally acquire and use a psychological advantage over children by designing commercials that blur the line between fact and fantasy so that children will be persuaded that illusions appearing on commercials are real. For example, advertisers commonly use accelerated camera speeds, trick shots such as low camera angles that make the product look taller than it is, or extreme closeups of the product to make it look larger. The attributes of products such as toys are often overstated so that one could assume that they work perfectly every time, when in reality they frequently malfunction. Often commercials are set in fantasy environments, are animated, and use “heroes”—comic and cartoon characters and program personalities, children’s trusted friends—to sell the products. In a one month survey, fifteen percent of all commercials used personality tie-ins, including characters from “Peanuts,” “Star Trek,” “the Flintstones,” and “the Waltons.”²³ Children do not realize that the creator of Fred Flintstone is being paid to say that a cereal tastes good, but instead are likely to believe Fred Flintstone’s representations.

The use of premiums (giving away another item with the purchase of the product) is a favored method used to sidestep selling the product on its own qualities.²⁴ For example, the child is exhorted to buy a specific cereal because of a prize hidden in the box. Through the use of premiums and the

18. Elias, *supra* note 7, at 17.

19. *Id.* at 22.

20. See HELITZER & HEYEL, *supra* note 17, at 102-11.

21. W. MELODY, CHILDREN’S TELEVISION: THE ECONOMICS OF EXPLOITATION 89 (1973).

22. See generally Bever, *supra* note 8.

23. *Toys Usurp Ad Time While Public Service Announcements Perish in the Holiday Rush*, ACTION FOR CHILDREN’S TELEVISION NEWS, Fall 1976, at 5. See also Action for Children’s Television, 50 F.C.C.2d 1, 16 (1975); Goldsen, *Toys and the Imagination of Children*, HUMAN BEHAVIOR, Dec. 1976 at 17.

24. See 39 Fed. Reg. 25,505 (1974).

other techniques mentioned above, the manufacturer and advertiser attempt to convince the child that the mundane product is a unique commodity that he and his peers should not live without. How special can a new breakfast cereal be? Advertisers must of course be allowed to use their ingenuity to distinguish their product from a competitor's; however, they should be restrained from the kind of artifice that amounts to misrepresentation when the young audience is considered.

Sellers have most of the available knowledge about the capability of, manufacture, and any dangers that characterize a product. The child, or purchaser of children's products, is in a position to know only what the seller discloses.²⁵ Moreover, even when occasional disclaimers in the body of the advertisement qualify misrepresentations (such as the warning that batteries are not included), they are often ineffective because the disclaimer is accompanied by music, is spoken so quickly that it is barely discernible, or is said in a different tone of voice so that it seems unrelated to the advertisement. In addition, studies show that children do not adequately comprehend disclaimers unless the vocabulary used is appropriate for them.²⁶

The seller's seduction in wonderland is successful. Children do not have the experience necessary to evaluate the actual information conveyed by an advertisement and to balance the knowledge against their emotional response to the slick, persuasive presentation. A recent survey of children in grades one through five showed that seventy-five percent asked their mothers to purchase the cereal they saw on television and that eighty percent requested the toys they saw.²⁷ Because children strongly influence their parents' buying choices,²⁸ and parents can hardly monitor every commercial, advertisers and marketing consultants calculate their messages accordingly: " 'they pitch these toys to them, complete with slogans and recognizable advertising, and in the process create an army of surrogate salesmen, who in turn sell the products to their parents.' " ²⁹ Sellers are also aware that advertising plays an important part in children's socialization process,³⁰ but

25. See text accompanying note 14 *supra*.

26. R. Liebert, D. Liebert, Sprafkin & Rubinstein, *Effects of Television Commercial Disclaimers on the Product Expectations of Children* (1976) (Occasional Paper 76-8 written for Brookdale International Institute).

27. Elias, *supra* note 7, at 20 (quoting a survey by Charles Atkin of Michigan State University).

28. Avalon Industries, Inc., 83 F.T.C. 1728, 1750 (1973).

29. Gilbar, *Babes in (Franchise) Toyland*, NEW WEST, Dec. 20, 1976, at 63 (quoting Peggy Charen, president of Action for Children's Television).

30. NATIONAL ADVERTISING DIVISION, COUNCIL OF BETTER BUSINESS BUREAUS, INC., *CHILDREN'S TELEVISION ADVERTISING GUIDELINES—Preamble* (1975) [hereinafter cited as N.A.D.].

advertisements do not often encourage generally accepted positive social values such as friendship, equality, kindness, honesty, and generosity.³¹ Rather, children learn that physical appearance and material acquisition are the keys to personal success. They are led to believe that happiness is tied to new material possessions. Advertisements are especially unfair to low income parents who frequently feel they must spend more money than they can afford in order to outfit their children with the "right" clothes and possessions to make them feel accepted by neighbors and classmates.³²

This brief outline illustrates the superior resources, psychological power, and knowledge that sellers and advertisers of children's products have in their dealings with children. A problem arises when these commercial dealers abuse this power for profit and without regard for children's best interests.

II. Society Recognizes and Attempts to Remedy the Problem

Parents, the advertising industry, and government entities on many levels have recently recognized the inherent fiduciary relationship between sellers of children's products and their consumers. Each group has articulated its concern that children be protected against the seller's unfair commercial expertise and has offered its solution to this problem. The proposed remedies discussed below, however, are diluted either in scope or in force, and even if enforced concurrently, these solutions would not offer children adequate protection.

A. Parents and the Public

A group of concerned citizens was the first to launch an organized attack on the effect of children's advertising, especially when transmitted through television. Consumer interest groups such as Action for Children's Television (A.C.T.), have petitioned the Federal Communications Commission (FCC) to eliminate commercials on children's television shows.³³ A.C.T. and other such groups can take much credit for having brought the problem into focus nationally. Because of the slow response and inherent limitations of the government agencies petitioned,³⁴ however, their greatest achievement has been to educate the public to the abusive situation. Significantly, groups such as A.C.T. appear to be representative of more than their

31. *Id.*, at Principle IV.

32. See Elias, *supra* note 7, at 21 (quoting a pilot study by Daniel Yankelovich, Inc.).

33. Action for Children's Television, 50 F.C.C.2d 1 (1974).

34. See text accompanying notes 52-79 *infra*.

members' views. When the FCC issued a Notice of Proposed Rulemaking in response to A.C.T.'s petition, it received more than a hundred thousand letters,³⁵ most of which favored the petition. This reaction has been termed the largest response in the history of broadcast regulation.³⁶

Although recognizing the problem, the public might assume that parents, not the FCC or society, should be solely responsible for safeguarding their children from the commercial world. Surely, parents do have responsibility to protect their children. Parents should instruct their children to look both ways before crossing a street, but this does not replace the state's obligation to protect them further by painting crosswalks and regulating traffic. In many such situations that are out of the control of parents the state acts *in loco parentis* through its police power to regulate for the benefit of the common health and welfare.

For many reasons, advertisements aimed at children should be regulated, as traffic is. It is a truism that television is a staple of American children's lives. Given the advertising saturation techniques now employed, it is virtually impossible for parents to monitor every product promotion their children see.³⁷ Working parents are especially handicapped in the effort to censor their children's viewing, and as of March, 1975, over fifty percent of all women with children in the United States worked outside the home.³⁸ Also, merely limiting a child's exposure to the media has proven to be an ineffective remedy. Studies have shown that even when children's television viewing hours were restricted, purchases influenced by television were not proportionately reduced.³⁹ Inevitably, many of the seller's persuasive advertisements will reach children, even if only through friends, and will rival parental influence. There is therefore a responsibility to make the messages that reach children conform to standards set with the children's best interest in mind. No one would dispute that it is in the interest of the community, and not only the parents, that children be protected.

B. The Industry

The children's product industry, including both manufacturers and broadcasters, have recognized that children are a unique audience whose development is significantly affected by their constant influential compan-

35. 50 F.C.C.2d 1, 2 (1974).

36. Elias, *supra* note 7, at 21.

37. For an analogous discussion regarding parents' inability to supervise their children's viewing of films, see Comment, "*For Adults Only*": *The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141 (1959).

38. UNITED STATES DEP'T OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 421 (1976).

39. Elias, *supra* note 7, at 21.

ion, the television, and by the characters that populate its world: "Heretofore, parents, school and church have been the primary guiding forces in shaping values and judgments. However, the amount of time spent with T.V. today adds it as a fourth major influence."⁴⁰

The National Advertising Division of the Better Business Bureau,⁴¹ representing sponsors and advertising agencies, and the National Association of Broadcasters (N.A.B.)⁴² have both recognized that their failure to prevent exploitation of children is likely to lead to governmental intervention. Each group has issued regulatory codes to insure fair business practices in children's advertising, but consumer advocates have criticized these codes as being "more concerned with public relations" than with effectively restricting advertisers.⁴³ For example, the N.A.B. Code allows fantasy and animation in children's advertising if these practices are confined to the first one-third of the commercial.⁴⁴ This rule recognizes that the use of fantasy can amount to misrepresentation, but it does not really address the problem, because the child can make a false assumption about a product during the first one-third of an advertisement as easily as during the remaining time. More important, the effectiveness of both codes is limited in force as well as scope because neither group has the power to impose meaningful sanctions. Enforcement measures of the N.A.B. Code, for example, provide broadcasters with little incentive to comply with its standards. When a violation occurs, the member can either change the offending practice, resign, or be dropped as a code subscriber.⁴⁵ Of the five hundred commercial television stations licensed by the N.A.B., only four hundred subscribe to the Code.⁴⁶ In addition, forty-three percent of the commercial television stations licensed by the FCC do not even belong to the N.A.B.⁴⁷ To date, self-regulatory measures by industry provide at best only a limited restraint on advertisers and broadcasters.

Realistically, self-regulation cannot be relied upon unless the subject

40. N.A.D., *supra* note 30.

41. *Id.*

42. NATIONAL ASSOCIATION OF BROADCASTERS, CODE AUTHORITY, ADVERTISING GUIDELINES (1976) [hereinafter cited as N.A.B. CODE].

43. Adler, Friedlander, Lesser, Roberston, Rossiter, & Ward, The Effects of Television Advertising on Children: An Evaluation of the Literature, Interim Report 16 (Mar. 1976) (written for the National Science Foundation). See generally Note, *F.T.C. Guide Banning T.V. Ads That Entice Children: Soft Decision or Assertive Policy?*, 4 CAP. U.L. REV. 109 (1975) [hereinafter cited as *Banning T.V. Ads*].

44. N.A.B. CODE, *supra* note 42, at § (II)(A)(4).

45. Powell, *Protection of Children in Broadcast Advertising: The Regulatory Guidelines of Nine Nations*, 26 FED. COM. B.J. 61, 73 (1973).

46. [1976] TRADE REG. REP. (CCH) ¶ 60,687.

47. *Id.*

industries believe it is in their own best interest to submit to the regulation. If there is a possibility that reduced profits will result, business executives are wary of unnecessary zeal in the public interest because of their obligations to their employers and stockholders. In such circumstances, the state is obligated to assume the burden of regulation. Only if formulated and enforced impartially can such rules have the desired effect of protecting impressionable children.

C. Government's Concern and Obligation

The concern for protecting youth from exploitation for profit is international. In response to the commercial abuse of children's tendency to believe what they are shown or told, other national governments have promulgated broadcasting codes regulating advertising directed at children.⁴⁸ The broadcasting codes of Australia, Cypress, Finland, Great Britain, Hong Kong, Ireland, the Netherlands, and New Zealand, for example, all state that the general policy underlying these codes is that advertisers should treat young children with a special standard of care.⁴⁹ The wording of these codes suggests the high standard of care imposed on advertisers. "Limitations and prohibitions denoted [in the codes] by phrases such as 'utmost care and discrimination', . . . 'likely to endanger . . . children in particular', . . . and 'very great care and judgment' also reflect the special consideration demanded of broadcasters when their advertising is aimed at children."⁵⁰

Broadcast codes alone are not likely to be a solution to the problem in this country because the scope of such regulations is not broad enough to protect children from all forms of product and marketing abuse.⁵¹ Comprehensive, well-drafted, and strictly enforced federal regulations promulgated by both the FCC and the Federal Trade Commission (FTC) could possibly provide an effective solution to the problem, but no comprehensive regulations are now being contemplated.

The FCC has been asserted by some to be the proper source of governmental regulation to insure sellers' fair treatment of children.⁵² The FCC has officially recognized both the special relationship between broadcasters and young children and the special duty of care these broadcasters owe their young viewers: "Since children are less able to understand and withstand advertising appeals than adults, broadcasters should take the special characteristics of the child audience into consideration when determining the ap-

48. Powell, *supra* note 45.

49. *Id.* at 63 nn.4-13.

50. *Id.* at 63.

51. See text accompanying notes 52-79 *infra*.

52. 50 F.C.C.2d 1, 2-3 (1975).

propriate level of advertising in programs designed for them.”⁵³ After instigating an inquiry into television programming and advertising practices aimed at children, the FCC announced its “wait and see” policy. The commission elected not to exercise its power to regulate advertisements on television until it had an opportunity to observe and evaluate the effectiveness of the N.A.B.’s self-regulatory attempt and similar voluntary codes.⁵⁴ Only if self-regulation of the industry proves ineffective will the FCC consider issuing strict per se rules.⁵⁵ Even if the FCC were to abandon this laissez faire policy and assume an affirmative stance toward protecting children, the scope of their rules probably could not be broad enough to solve the problem. The FCC’s jurisdiction extends to regulation of the broadcast airwaves in the public interest.⁵⁶ Only the FTC has the authority to regulate advertising in all media and to sanction the party who instigates a deception.⁵⁷

The FTC was initially created by Congress to halt unfair methods of competition. With the adoption of the Wheeler-Lea Amendment⁵⁸ the FTC gained the authority, at least in theory, to protect consumers from unfair selling and advertising techniques even if the practices did not involve deception or injury to competition.⁵⁹ Early FTC decisions concentrated on protecting consumers from false and misleading claims made about a product. In the past five years, however, the FTC has recognized the enormous impact sophisticated advertising can have on a person’s psyche.⁶⁰ The commission’s recent official complaints reflect this concern, as it has challenged as unfair those practices that allegedly exploit consumers’ desires, fears, and anxieties. A typical example of such a complaint is the suit brought against I.T.T. Continental Baking Company,⁶¹ alleging that Wonder Bread’s claims exploited both children’s emotions and parental concern that a child grow up healthy and strong.

Moreover, the FTC’s decisions historically have emphasized that children should be especially guarded when involved in the commercial world. This policy was articulated as early as 1934 in *FTC v. R. F. Keppel & Bro.*⁶² The Supreme Court in *Keppel* affirmed the FTC’s prohibition of a candy

53. *Id.* at 12.

54. *Id.* at 13.

55. *Id.*

56. 47 U.S.C. §§ 303, 307 (1970).

57. *Banning T.V. Ads*, *supra* note 43, at 115.

58. 15 U.S.C. § 45(a) (1) (Supp. V 1975).

59. *See F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972).

60. Isaacs, *Psychological Advertising: A New Area of FTC Regulation*, 1972 WL. L. REV. 1097, 1102-05.

61. *I.T.T. Continental Baking Co.*, 83 F.T.C. 865 (1973).

62. 291 U.S. 304 (1934).

marketing campaign that encouraged children to purchase candy inferior to similarly priced goods in hopes that their purchases would contain added prizes and candy. The court stated that children should not be the target of such an unscrupulous technique because they were too young and vulnerable to exercise intelligent judgment in such a transaction.⁶³ This policy is echoed in later FTC decisions. In *In re Wilson Chemical Co.*,⁶⁴ the respondent used a system of deceptive and threatening letters to coerce payment for its salve from both adults and children who had been induced to be salespersons for this product. In discussing the letters the court stated: "They are strong letters to send to adults. Their coercive nature is increased when it is considered that in the majority of cases the recipients of these letters are probably children."⁶⁵ Again, in *In re Ideal Toy Corp.*,⁶⁶ the Commission stated that age and lack of experience should be considered when determining whether an advertisement aimed at the young consumer was exaggerated or untrue in regard to the intended audience.⁶⁷

Although the FTC has recognized both the unfairness that exists in manipulative psychological advertisements and the special vulnerability of children in the commercial world, it has never, except in consent decrees, held a seller to the duty of making children's advertisements fair. In the *I.T.T.* decision, the commission avoided the fairness issue by finding that the claims made by the defendant were false.⁶⁸ Chairman Lewis Engman, however, recognized an inherent "fiduciary relation" between sellers and children, indicating that in the future the commission might impose upon sellers a special duty of care with regard to children's advertisements:

I am not suggesting here . . . that Section 5 condemns every psychological advertisement directed to children. . . . But the advertiser who chooses a child audience as the target group for his selling message is subject not only to standards of truthful advertising; he is . . . also bound to deal in complete fairness with his young viewers. . . . [A]dvertising directed to or seen by children which is calculated to, or in effect does, exploit their known anxieties or capitalize upon their propensity to confuse reality and fantasy is unfair within the meaning of Section 5 of the Federal Trade Commission Act.⁶⁹

Although the FTC has indicated it intends to hold the seller to a higher standard of care to insure fair and non-manipulative advertising aimed at young consumers, the limited sanctions the FTC can impose will not afford

63. *Id.* at 309.

64. 64 F.T.C. 168 (1964).

65. *Id.* at 183.

66. 64 F.T.C. 297 (1964).

67. 64 F.T.C. at 310. See also *In re Mattel, Inc.*, 79 F.T.C. 667 (1971).

68. 83 F.T.C. 865 (1973). See Reiss, *Special Problems in Advertising*, 31 FOOD DRUG COSM. L.J. 252, 256 (1976).

69. 83 F.T.C. at 942 (Engman, C., dissenting in part).

children the protection they need. The FTC regulates unfair methods of competition through individual consent orders or adjudication and by industry guidelines and regulations.⁷⁰ The paperwork involved in effectuating these remedies is quite burdensome. Procedural due process requires that an and nothing can stop the offending party from continuing the challenged practice until the plaintiff has exhausted or abandoned all avenues of appellate review.⁷¹ This case-by-case method affords piecemeal regulation at best and is time-consuming.⁷² The final court of appeals decision in *Firestone Tire & Rubber Co. v. FTC*,⁷³ was issued five years after the advertisements in question had been discontinued, and the suit challenging Carters' promotion of its "little liver pills" took sixteen years to complete.⁷⁴ Moreover, FTC resources are limited,⁷⁵ and the temptation is powerful for an FTC attorney simply to accept a consent order under which the offender agrees only to withdraw the misleading advertisement, after the seller has reaped the initial profit from it. The precedential value of such administrative decisions is limited, inasmuch as only the specific acts terminated in each case will be prohibited in the future. There is no authority to prevent the sellers from employing other misleading techniques to sell their products to children. Only broad industry regulations can prohibit misrepresentation in general and impose meaningful limits on the use of such techniques.

The FTC can issue standards of conduct for an entire industry through trade regulation rules for the purpose of not only defining but also preventing unfair practices.⁷⁶ There is reason to believe that such regulations will not be promulgated soon, because formulating these rules is at least as time consuming as individual litigation.⁷⁷ The FTC can also provide sellers of children's products with industry guidelines warning of practices that the commission may challenge in the future. The FTC generally prefers this method because the guidelines may be promulgated quickly and compliance

70. E. COX, R. FELLMETH, J. SCHULZ, 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION 219 (1969) [hereinafter cited as NADER].

71. 15 U.S.C. § 45 (1975).

72. "Individual actions are 'perhaps the least efficient, most expensive, and most time-consuming way' of achieving regulation." *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1083 (1967) (quoting Elman, *The Federal Trade Commission and the Administrative Process*, 8 ANTITRUST BULL. 607, 611 (1962)).

73. 481 F.2d 246 (6th Cir. 1973).

74. *Carter Products, Inc. v. F.T.C.*, 268 F.2d 461 (9th Cir.), cert. denied, 361 U.S. 884 (1959). See generally Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693, 697 (1976).

75. See Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496, 499 (1972).

76. 15 U.S.C. § 57(a)(1)(B) (Supp. V 1975). See generally Rhoades, *Reducing Consumer Ignorance: An Approach and Its Effect*, 20 ANTITRUST BULL. 309 (1975).

77. See NADER, *supra* note 70, at 217.

is voluntary, which means that expensive lawsuits can be avoided. Although it can utilize both of these regulatory options, the commission, when it rejected the proposed guide on television advertising of premiums to children,⁷⁸ declared that it does not intend to issue per se rules or industry guidelines against deceptive practices of advertising directed toward children. The commission stated that because of its limited resources and lack of information about the effect of specific advertising techniques on children, it would continue to regulate children's advertising strictly on a case-by-case basis.⁷⁹

This stance clearly indicates that the commission will respond in limited fashion to specific situations but will not attack the general problem. Currently, specific regulations do not afford sufficiently broad protection, and the only existing general regulations provide for voluntary compliance. As indicated above, a seller will usually comply with those aspects of a voluntary code that will not impair his profit margin. What is lacking is a comprehensive remedy in the form of regulations that not only will deter the seller's misconduct but will state the standard of conduct with which he must comply.

III. Legal Precedent: Special Protection Traditionally Afforded to Children

The law should give children special protection against their most powerful exploiters, the sellers and advertisers of children's products. American jurisprudence has recognized Rousseau's understanding of the unique qualities of childhood and has long afforded children a special standard of care: "[N]ature wants children to be children before they are men. . . . Childhood has ways of seeing, thinking, and feeling peculiar to itself; nothing can be more foolish than to substitute our ways for them." ⁸⁰

Courts have assumed a dominant *parens patriae*⁸¹ role in protecting children, perhaps best illustrated by cases in which this role comes in conflict with a child's First Amendment rights. Often, this interest in the welfare of children supersedes their First Amendment rights, which clearly would have prevailed if an adult were involved. For example, in *Prince v.*

78. F.T.C., Statement of Reasons for Rejecting the Proposed Guide on Television Advertising of Premiums to Children (Mar. 9, 1977).

79. *Id.* at 18.

80. Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 L. & CONTEMP. PROB. 38, 45 (1975).

81. "Parens patriae" is defined as: "In the United States, the State, as a sovereign—referring to the sovereign power of guardianship over persons under disability" Black's Law Dictionary 1269 (4th ed. 1968).

*Massachusetts*⁸² a state law prohibiting children from selling merchandise in a public place was upheld when enforced against a child who was distributing religious literature with her guardian. In so ruling, the court gave more weight to society's *parens patriae* role than to the child's First Amendment right of freedom of religion. *Ginsberg v. New York*⁸³ cited *Prince* with approval and affirmed the state's function to legislate to protect a child's naïveté by classifying magazines as obscene when sold to minors, although they would not be so labeled if sold to adults: " 'Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the First Amendment in the same way as those applicable to adults.' " ⁸⁴

Specific doctrines and statutory enactments in the substantive areas of torts and contracts also provide good examples of how children are treated differently from adults under the law. General tort law does not hold a child to an adult standard of care but instead requires him to conform to the standard of a "reasonable person of like age, intelligence, and experience under like circumstances."⁸⁵ Out of this different negligence standard has grown the "attractive nuisance" doctrine, which requires the occupier of land to treat trespassing children with a higher degree of care than adults and which excuses those children from the adult standard: "Because of his immaturity and want of judgment, the child may be incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing, or of making his own intelligent decisions as to the chances he will take."⁸⁶ Like the owner of an "attractive nuisance," the purveyor of a children's product should be held to a special duty of care corresponding to the reduced responsibility of the child under the law. This special duty of care exists even though parents and guardians have the primary duty of protecting their children, since it is impracticable for parents to exercise constant vigilance over their children.⁸⁷ Indeed, many parents would agree that television itself is an attractive nuisance, requiring them to work constantly to counter the harmful influences of shows and advertisements whose content they cannot control. It seems likely that parents and guardians find it easier to restrain their children from trespassing than to monitor their television viewing of advertising.

82. 321 U.S. 158 (1944).

83. 390 U.S. 629 (1968).

84. *Id.* at 638 n.6 (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963)).

85. RESTATEMENT (SECOND) OF TORTS § 283A, at 14 (1965). *Accord*, W. PROSSER, LAW OF TORTS § 32, at 154-57 (4th ed. 1971).

86. *Id.* § 59, at 364.

87. *Id.*

The justification for treating children differently from adults in the law of contracts is especially germane to the seller-child relationship because the goal of this special treatment is to prevent commercial exploitation of children by adults.⁸⁸ In order to afford children this extra protection, contracts with a child are voidable at the child's option.⁸⁹ This rule is broadly applied by courts, for the law makes no distinction based on the maturity of the child as long as he or she meets the age requirements.⁹⁰ A child's right to void a contract also prevails over innocent third party purchasers, except when the child is liable for necessities.⁹¹ Courts thus intervene to protect children in contract transactions when adults are not so protected. The law should extend this policy by analogy to protect a child who is exhorted to "make a contract" by buying a product or service that a worldly adult seller has created especially for children. As of yet, however, children have not been found to occupy a special position vis-à-vis the seller of children's products.

IV. A Judicial Solution: The Fiduciary Doctrine

The policy of affording children special protection in their interactions with adult society is part of a broader jurisprudence. The basic function of law has been defined as "provid[ing] for the employment of the force of society to restrain those who infringe the liberty of others."⁹² Fiduciary doctrines have long been used to help perform this function. In their discretion, the courts have imposed special requirements on relationships they deem inequitable because of the potential for exploitation of one of the parties.

The term "fiduciary" is a nebulous concept. The underlying purpose of the concept and suitable criteria for its application have eluded satisfactory articulation by the courts. Courts apply the fiduciary doctrine on a case-by-case basis,⁹³ with holdings clouded by such vague language as "trust and confidence reposed by one party in the integrity and fidelity of another,"⁹⁴ or "dominion"⁹⁵ of one party over the other. Courts have found fiduciary relationships to include partner, attorney-client, principal-agent, trustee-beneficiary, landlord-tenant, parent-child, guardian-ward, ances-

88. *Burnand v. Irigoyen*, 30 Cal. 2d 861, 866, 186 P.2d 417, 420 (1947).

89. 2 WILLISTON, CONTRACTS § 226, at 8 (3d ed. 1959).

90. *Id.* § 224, at 3-4.

91. *Id.* § 33, at 25-6.

92. R. POUND, OUTLINE OF LECTURES ON JURISPRUDENCE 66 (5th ed. 1943).

93. This method has led some commentators to conclude that there can be no general definition of a fiduciary relationship. See Sealy, *Fiduciary Relationships*, 1962 CAMB. L.J. 69, 73.

94. See *In re Cover's Estate*, 188 Cal. 133, 143, 204 P. 583, 588 (1922).

95. *Hemenway v. Abbott*, 8 Cal. App. 450, 465, 97 P. 190, 196 (1908) (petition for rehearing).

tor-heir, husband-wife, and executor-legatee relationships among others.⁹⁶ One commentator suggests that courts have refrained from particularizing instances in which a fiduciary relation exists out of apprehension that this doctrine would be limited to those specific relationships that have already been judicially recognized.⁹⁷

An examination of certain common themes discernible in the fiduciary relationship cases will clarify the purpose of the doctrine so that it can be applied appropriately to other potentially inequitable relationships.⁹⁸ There appear to be three general characteristics of relationships to which fiduciary doctrines have been applied. One party (hereafter termed "advisor") has (1) power over the other, more vulnerable party (the "reliant" party), (2) who is characterized by *relative weakness*, and (3) the advisor has the discretion to *reach out* and *knowingly exploit* this power for his own financial advantage and the reliant party's corresponding financial loss. When the advisor does in fact abuse this power in favor of himself, equity will intervene. The greater the advisor's power to control the reliant party, the more urgent is the need for the law to insure that this power is used fairly. Hence, the scope of the advisor's fiduciary duty is to a great extent correlative with the amount of control he can impose on the reliant party.⁹⁹ The advisor's power can consist of one or a combination of the following factors: superior knowledge,¹⁰⁰ experience,¹⁰¹ resources,¹⁰² control,¹⁰³ or psychological power¹⁰⁴

96. *Robins v. Hope*, 57 Cal. 493, 497 (1881). The list of fiduciary relationships is extensive, and also includes: stockbrokers, escrow agents, insurance agents, accountants, and their respective clients, and the physician-patient relationship. *United States Liab. Ins. Co. v. Hardinger-Hayes, Inc.*, 1 Cal. 3d 586, 596, 463 P.2d 770, 776, 83 Cal. Rptr. 418, 424 (1969).

97. J. POMEROY, *EQUITY JURISPRUDENCE* § 956a, at 793 (5th ed. 1941).

98. In the law of fiduciaries, the terms "fiduciary relation" and "confidential relation" are used interchangeably. *In re Cover's Estate*, 188 Cal. 133, 143, 204 P. 583, 588 (1922); *Robins v. Hope*, 57 Cal. 493, 497 (1881); *Estate of Gelonese*, 36 Cal. App. 3d 854, 861-3, 111 Cal. Rptr. 833, 837 (1974). *But see* *Vai v. Bank of America*, 56 Cal. 2d 329, 337-39, 364 P.2d 247, 252-53, 15 Cal. Rptr. 71, 76 (1961). Scholars in the law of trusts have pointed out technical distinctions between these terms. *See* G. BOGERT, *TRUSTS & TRUSTEES* § 482, at 132-33 (2d ed. 1960). However, they in turn use the terms interchangeably in their own writings, indicating that both terms in fact refer to the same relationship. Bogert, *Confidential Relations and Unenforceable Express Trusts*, 13 CORNELL L.Q. 237, 238 (1928). This commentary will also treat the two terms as indistinguishable.

99. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4-5 (1975); Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949).

100. *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P.2d 958 (1945) (superior party possessed special knowledge gained in the capacity of corporation director and president).

101. *Szekeres v. Reed*, 96 Cal. App. 2d 348, 215 P.2d 522 (1950) (advisor was a chiropractor and family friend). See text accompanying note 108 *infra*.

102. *Stevens v. Marco*, 147 Cal. App. 2d 357, 305 P.2d 669 (1956) (attorney who

over the more vulnerable party. The weakness of the reliant party can include limited access to knowledge,¹⁰⁵ limited experience and underdeveloped intellect,¹⁰⁶ or infirmity because of advanced age.¹⁰⁷

These principles are manifest in the statutory laws governing trusts and corporations and also appear in a variety of relationships not governed by these laws. The facts of a California case, *Szekeres v. Reed*,¹⁰⁸ illustrate these general principles. In *Reed*, the existence of a fiduciary relationship invalidated a gift of land deeded to the advisor by the reliant party. The primary factor that influenced the court was the recipient's superior knowledge compared with the grantor's vulnerability; the grantor could not read or write well, and was of limited intelligence. The advisor also had superior psychological advantage because he was the family chiropractor and a personal friend and had promised the grantor's dying mother he would care for her son.

The factor of "reaching out" is best illustrated by the Massachusetts Supreme Court decision in *Broomfield v. Kosow*,¹⁰⁹ in which the court interposed a fiduciary relation between a lender-builder and a nursing home operator. There was a personal and business friendship between the two parties and the lender-builder had full knowledge that the nursing home operator trusted him completely in all their business transactions. The court held that the defendant violated his fiduciary obligation when he "'exerted' the influence springing from that trust and confidence to obtain personal advantage at the expense of Romano and his nursing homes."¹¹⁰

took charge of the plaintiff's patent had both the resources to gain special knowledge of the patenting process and superior business skills to market the patent).

103. *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (majority stockholders, because of their pervasive control, were held to be in a fiduciary relationship with the minority stockholders).

104. Psychological power can be defined as either (1) continuing associations of confidence, such as lawyers who have advised each other for years (*South v. Wishard*, 146 Cal. App. 2d 276, 303 P.2d 805 (1956)); (2) family associations, such as husband and wife (*Martin v. Martin*, 110 Cal. App. 2d 228 (1952)); or (3) the confidence a client has in a professional, such as an attorney or physician (*Stevens v. Marco*, 147 Cal. App. 2d 357, 305 P.2d 669 (1956)).

105. *Driscoll v. City of Los Angeles*, 67 Cal. 2d 297, 431 P.2d 245, 61 Cal. Rptr. 661 (1967) (fiduciary relationship held to exist between a widow seeking her husband's pension and a city that purported to have knowledge and training to determine the widow's rights, because the widow did not have corresponding knowledge or the means to obtain it).

106. *Szekeres v. Reed*, 96 Cal. App. 2d 348, 215 P.2d 522 (1950).

107. *Grider v. Manisera*, 11 Cal. App. 2d 355, 53 P.2d 982 (1936) (plaintiff's advanced age was one of the reasons for imposing the fiduciary obligation).

108. 96 Cal. App. 2d 348, 215 P.2d 522 (1950).

109. 349 Mass. 749, 212 N.E.2d 556 (1965).

110. *Id.* at 757, 212 N.E.2d at 561.

In virtually all the relations that courts term "fiduciary," interaction between the parties involves profitmaking. Hence, it is safe to state that the primary purpose of the fiduciary doctrine is to protect the reliant party from being exploited in commercial transactions in which people are normally involved in arms-length, objective dealings.¹¹¹ A similar protective attitude lies behind the policy of affording children special legal treatment in situations that could be characterized as inherently unequal: the attractive nuisance enticing an impressionable child, or the contracting party taking advantage of the inexperience of a minor. Logically, then, the courts can and should extend the fiduciary doctrine to protect children in marketplace dealings where they now lack special legal protection, just as vulnerable adults are protected in the situations discussed above.

V. Application of the Fiduciary Doctrine to the Seller-Child Relationship

A. The Obligations

The relationship between a seller and a child meets every characteristic typically ascribed to the advisor's fiduciary relationship with a reliant party. Indeed, trusting, indiscriminating children are the classic reliant parties. Accordingly, it is proper that in appropriate cases manufacturers, market analysts, advertisers, broadcasting stations, distributors, and retail sellers of children's products should all be held to stand in a fiduciary relationship to children or to those who purchase products on their behalf. Such a doctrine would not entrap the unwary, because sellers do not act accidentally. On the contrary, as described above, they carefully calculate each step of their product promotion. The duties of this fiduciary relationship should arise when the seller knowingly designs a product for children's use or consumption and then reaches out to the child and exploits the inequality of their positions to sell the product. The existing cases that deal with fiduciary relationships have clearly defined the results of such an application of the fiduciary concept. A fiduciary duty in this context would include the following obligations:

1. To Disclose Fully and Fairly all Facts Material to the Transaction.¹¹² This duty would involve, for example, the disclosure of the size, speed, materials, motion, function, and price of the product.

111. See Weinrib, *supra* note 99, at 6.

112. See *Broomfield v. Kosow*, 349 Mass. 749, 212 N.E.2d 556 (1965) (defendant who did not disclose the true cost of a construction contract, although he was aware of it, was held to have violated his fiduciary duty). See also *Stevens v. Marco*, 147 Cal. App. 2d 357, 305 P.2d 669 (1956); G. BOGERT, TRUSTS & TRUSTEES § 544, at 593 (2d ed. 1960).

2. To Research Affirmatively and Make Known any Detrimental Effects of the Product or Service.¹¹³ A seller should disclose, for example, the role of sugar in causing tooth decay or the fact that breakfast cereals, candy, and other prepared foods with over fifty percent sugar do not properly fit into a well-balanced nutritional program.

3. To Represent all Advertisements and all Products in a Manner That Would Not Be Likely to Mislead a Child of Ordinary Maturity, Outlook, Imagination, Impressionability, and Trust.¹¹⁴ This duty may restrain the advertiser's use of cartoon characters and program hosts. It may also require him to make plain, reliable claims that a child can understand, for example, "this toy launcher is propelled by a rubber band," or "this toy works perfectly only half the time."

4. To Protect Children From Harm Caused by the Product. The seller should be held to a standard similar to that of strict products liability for harm that his product may cause children.

B. The Remedies

If the seller were to conduct business under the standards of this fiduciary relation, children would be adequately protected in their position as recipients of the seller's promotional material, yet sellers would be left free to market and advertise their products. Because most sellers will probably not fulfill these duties voluntarily, legal remedies must provide them with the incentive to comply. Since breach of fiduciary duty can amount to a tort,¹¹⁵ remedies available in tort law, including compensatory and punitive damages, injunctions, and restitution,¹¹⁶ are all possible tools for the court to use in proper circumstances. The dual aims of tort law which are, broadly speaking, to compensate for injuries suffered¹¹⁷ and to prevent the occurrence of harm,¹¹⁸ underlie the remedies proposed below. To achieve the latter

113. "When confidence is reposed and accepted, the person trusted is liable for concealing facts which by reason of the relationship he should disclose." *Reed v. A.E. Little Co.*, 256 Mass. 442, 449, 152 N.E. 918, 920-21 (1926) (contract to assign a patent right between an inventor and a corporation).

114. The duty to deal in complete fairness was best articulated by Chief Judge Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928): "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

115. *Pepitone v. Russo*, 64 Cal. App. 3d 685, 134 Cal. Rptr. 709 (1976). *Accord*, D. DOBBS, *THE LAW OF REMEDIES* § 10.4, at 684 (1973).

116. W. PROSSER, *LAW OF TORTS* § 1, at 2 (4th ed. 1971).

117. *Id.* at 6.

118. *Id.* § 3, at 15-16.

aim most effectively and at the same time protect children to the greatest extent possible, the best remedies not only should prevent recurrence of a seller's disfavored conduct once it has been judicially disapproved but also affirmatively encourage the seller to engage in desirable, non-manipulative conduct toward children buyers. These policies suggest the following proposed remedies for breach of this fiduciary duty:

1. At the buyer's option, rescission of all contracts for sale of products that were induced by judicially disapproved advertising techniques.

2. General damages, perhaps the difference between the worth of the product as acquired and what was paid for it in expectation of what was represented in the promotion.

3. Special damages to compensate for inconvenience and nuisance¹¹⁹ in purchasing the seller's product.

4. Permanent injunctions restricting the use of harmful advertisements or misleading marketing techniques.¹²⁰

5. Court orders requiring the seller to finance counter-advertising to be broadcast for a sufficient amount of time to offset the harmful effects of the seller's manipulative advertisements. This is essentially the method used by the FTC when it requires corrective advertising.¹²¹ A mere admission or clarification of possible misrepresentation in former advertisements may not eradicate the subliminal messages conveyed to children by powerful psychological appeals, unless the corrective advertisements employ equally effective techniques. Instead of being required only to correct former unfair tactics, seller should be compelled to engage in educational counter-advertising. These advertisements should convey information about the positive and negative qualities of the seller's product or service and teach children how to make rational consumer judgments. They should also encourage positive social standards of behavior. For example, a cereal com-

119. For a general discussion of nuisance, see W. PROSSER, *TORTS*, 571-612 (4th ed. 1971).

120. The imposition of this duty would guard against unfair packaging and promotion at the retail store, for instance.

121. The FTC has required corrective advertising in lieu of the traditional cease and desist order, which merely eliminated the unfair advertisement, in an attempt to erase the residual effects of deceptive or unfair advertisements on consumers. Comment, *Corrective Advertising: The FTC's New Formula For Effective Relief*, 50 TEX. L. REV. 312 (1972). The type of corrective advertising varies with the specific case. E.g., *In re Warner-Lambert Co.*, 86 F.T.C. 1398 (1975) (Warner-Lambert ordered to include in their ads the statement that Listerine will not prevent colds or sore throats); *In re Amstar Corp.*, 83 F.T.C. 659 (1973) (corrective advertisement disclaimed a prior representation that Domino sugar gave a person strength); *In re I.T.T. Continental Baking Co.*, 79 F.T.C. 248 (1971) (Profile Bread agreed to devote twenty-five percent of one year of advertising expenditures to correct possible misinterpretations of their prior advertisements).

pany that advertises its high sugar content food as "nutritional" might be required to run an advertisement presenting food groups and the body's need for a balanced diet or statistics about the harmful effects of the average American's eating habits. Similarly, a toy manufacturer might be required to sponsor an advertisement showing children and parents the creative and educational potential of homemade toys. Such advertisements would provide information in the public interest and are in harmony with the seller's fiduciary duty.

6. Punitive damages¹²² should also be awarded; perhaps the amount should be equivalent to the seller's advertising budget for one year, but in any case in a significant amount. This money could be used to establish a governmental mechanism to oversee and review products and advertisements for children.¹²³ The seller, under a protective order, should be required to submit to such a mechanism all research, psychological and marketing tests, and studies that might shed light on the adverse effect of his product or its advertisements on children.

7. General public directors should be permanently appointed to the seller's board of directors.¹²⁴ This is a broad remedy, not specifically tailored to the violation of the fiduciary duty. However, courts may find a mechanism within the corporate structure itself an appropriate means to impose responsibility upon sellers and to insure that a child's best interests will at least be considered as marketing decisions are made. These members, representing the consumer public, would have the decision-making power of a regular board member and the "watchdog" responsibility to investigate all aspects of the company that might adversely affect children. The public directors would also insure that the board consider consumer as well as business interests before it makes vital policy decisions.

VI. Would the Courts Impose the Fiduciary Obligation?

There may be questions regarding, and objections to, the application of such a fiduciary obligation. A response to these questions and objections will illustrate the general benefits to be gained from such a doctrine. If courts, rather than the Congress, or the executive through the FTC, are the

122. See *Rivero v. Thomas*, 86 Cal. App. 2d 225, 194 P.2d 533 (1948), allowing recovery of punitive damages for breach of fiduciary duty. See also D. DOBBS, *THE LAW OF REMEDIES* § 3.9, at 211-12 (1973).

123. *E.g.*, *United States v. Firestone Tire & Rubber Co.*, [1976] TRADE REG. REP. (CCH). ¶ 60,729 (Firestone ordered to produce corrective advertisements to be submitted to the Bureau of Consumer Protection of the FTC for approval before their release).

124. See C. STONE, *WHERE THE LAW ENDS* 152-53 (1975).

first to impose the fiduciary duty discussed herein on sellers of children's products, those sellers whose cases are among the first adjudicated might object that they would be placed at a competitive disadvantage. However, it is safe to assume that such a powerful industry would be quick to seek final adjudication of the point by the highest court of the jurisdiction, since millions of dollars could depend on the outcome. If the court saw fit to impose the fiduciary duty, all sellers would be obligated to follow the same high standard of care when dealing with children. Thus, the fiduciary doctrine would place all sellers on equal footing and facilitate free competition.

Some people might object that existing legal doctrines afford children adequate protection. In particular cases when sellers make recognizably deceptive or misleading claims, the possibility of a suit for false and misleading advertising based on a legal doctrine proper for the courts to enforce may be a restraining influence. However, the harm perpetrated by a seller on children is often subtle and the precise deception difficult to pinpoint. A seller uses his refined knowledge to uncover precisely how children will react to a certain set of stimuli and then develops promotional techniques accordingly. He may, for example, sponsor a cereal commercial in which a popular cartoon character tells children that his product has chocolate goodness in every bite and is the fun part of a balanced breakfast. This statement probably would not, in the strict legal sense, be termed fraudulent or deceptive. Because children trust cartoon characters, however, and because sellers are aware of this fact, the seller's use of this promotional technique can be unfairly misleading and should be considered overreaching. Courts should not be forced to stretch existing fraud doctrines to remedy this type of inequitable situation when the fiduciary doctrine is peculiarly suited to protecting children from exploitive techniques. Courts recognizing this fact can be expected to react favorably to a suitable case properly briefed and to apply the fiduciary doctrine that confronts this problem directly.

Moreover, even if the child or his representative were to meet the burden of proving fraud in advertising, the actual damages would be slight relative to the seller's financial gain from the fraud. The annual rewards for successful manipulation of the children's market are measured in millions of dollars. Awarding actual damages would amount to no more than a financial slap on the seller's wrist and would be unlikely to discourage his misconduct.¹²⁵ The fiduciary doctrine is especially appropriate here because it differs from other legal remedies in its deterrent value. It mandates that the seller not only must refrain from unfair techniques but also must employ positive techniques for the child's best interest, because the fiduciary advisor has an obligation actively to protect the relying party. Further, once

125. *Id.* at 30-34.

courts recognize the existence of the fiduciary relation, the seller, not the child, will have the burden of proof in any question of compliance with the obligation.¹²⁶

Wholesalers or retailers who distribute children's products, objecting that the fiduciary doctrine is too comprehensive in scope, may urge the court to apply it only to those responsible for creating and advertising children's products. The comprehensive nature of the fiduciary doctrine, however, is perhaps its largest value as protection. Market analysts and researchers, distributors, and retail sellers of children's products, as well as manufacturers, advertisers, and broadcasting stations, have some control over the promotional techniques, development, or distribution of children's products and a corresponding responsibility not to abuse this control. The pervasive duty of care recommended can be analogized to that imposed by the doctrine of strict products liability, in which all those engaged in the chain of distribution are held strictly liable for the product in order to give the consumer the maximum protection:¹²⁷ "Particularly today, when the large wholesale supply house, or even the retail chain, is actually the prime mover in marketing the goods . . . it is unrealistic to draw any distinction between different kinds of sellers."¹²⁸ The courts should therefore have no problem holding manufacturers and all accomplices in the marketing of "baited" products for children liable for any damages. Only a comprehensive application of the doctrine would insure that children receive the protection they need.

The fiduciary doctrine can be applied by the courts easily, and does not require the establishment of a new agency to enforce it. Easy administration, a broad scope of application, a general prohibition of subtle exploitive techniques, and the clear imposition of an affirmative duty of care are all special benefits of a judicially enforced fiduciary doctrine that do not exist in any other legal remedy that can be used to protect children. Therefore, the courts should be encouraged to apply this traditional principle to redress and to prevent the exploitive treatment of children by the purveyors of children's products.

VII. Constitutional Interests to be Furthered by the Fiduciary Doctrine

Advertisers and broadcasters may claim to be exempt from the fiduciary obligations on constitutional grounds, now that commercial speech appears to be afforded full First Amendment protection.¹²⁹ However, an

126. See G. BOGERT, *LAW OF TRUSTS* § 96, at 351 (5th ed. 1973).

127. W. PROSSER, *LAW OF TORTS* § 100, at 665 (4th ed. 1971).

128. *Id.*

129. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

examination of the policies behind this recent extension of First Amendment protection will show that they are harmonious with the fiduciary concept, which in no way imposes a limitation or prior restraint on speech.

The theory of free speech is grounded on the belief that people will make a well-reasoned choice if presented with all points of view on an issue.¹³⁰ Thus, although the First Amendment guarantees the freedom of speech,¹³¹ certain types of speech such as libel,¹³² obscenity,¹³³ and "fighting words,"¹³⁴ have not been afforded full First Amendment protection because the harm they do outweighs their contribution to a free exchange of ideas. Until this year, the "commercial speech doctrine" announced in *Valentine v. Chrestensen*¹³⁵ included advertising among the types of speech deserving less than complete First Amendment protection. Cases subsequent to *Chrestensen* evolved the "commercial speech doctrine" into a judicial policy by which the courts determined the degree of protection to be granted advertising by balancing the social importance of that speech against the government interest in curtailing it. If the court determined that the advertising performed an additional function, such as editorializing¹³⁶ or promulgating religious ideas,¹³⁷ these competing interests almost invariably outweighed the state's interest in regulation. If the advertisement were purely commercial and only conveyed product information, courts tipped the scales in favor of governmental regulation of this speech as long as the regulation was reasonable.¹³⁸ A concise statement of the policy justification for affording reduced protection to purely commercial speech was made in *Banzhaf v. FCC*:¹³⁹

It is established that some utterances fall outside the pale of First Amendment concern. Many cases indicate that product advertising is at least less rigorously protected than other forms of speech. Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not

130. See Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963).

131. U.S. CONST., amend. I.

132. E.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

133. E.g., *Ginzburg v. United States*, 383 U.S. 463 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

134. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

135. 316 U.S. 52 (1942).

136. E.g., *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964).

137. E.g., *Jamison v. Texas*, 318 U.S. 413 (1943).

138. E.g., *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376 (1973). See Note, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761 (1976).

139. 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).

provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.¹⁴⁰

Measured against the standard of the old "commercial speech doctrine" as stated in *Banzhaf*, the fiduciary doctrine as applied to the seller-child relationship would clearly withstand a constitutional challenge. The speech regulated would be purely commercial, and the government interest in the regulation for the protection of children is reasonable.¹⁴¹

However, the fiduciary doctrine must also be examined in light of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁴² in which the Supreme Court questioned the commercial speech distinction and appeared to extend full First Amendment protection to purely commercial speech. The Court held unconstitutional a Virginia statute that prohibited the advertising of prescription drug price information, reasoning that the advertiser's economic interest in that speech did not remove it from the sphere of First Amendment protection.¹⁴³ The Court also considered commercial speech worthy of constitutional protection, in light of the consumer's First Amendment right to receive commercial information he can use to make enlightened consumer judgments.¹⁴⁴

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.¹⁴⁵

Extending First Amendment protection to commercial speech implies that any regulation of this speech will now have to withstand the careful balancing test used previously when the advertising performed an additional function.¹⁴⁶ Thus, in *Virginia Citizens*, when the consumers' right to know and pharmacists' right to disseminate information were balanced against the state's public health interest in protecting the professionalism of its licensed pharmacists, the Court held that the ban on advertising could not stand because there were less restrictive means for the state to achieve its goal.¹⁴⁷

After adjudicating the particular fact situation presented, the Court went on to list certain general types of commercial speech regulation that

140. *Id.* at 1101-02.

141. See text accompanying notes 80-91 *supra*.

142. 425 U.S. 748 (1976).

143. *Id.* at 762.

144. *Id.* at 765.

145. *Id.*

146. See text accompanying notes 136-37 *supra*.

147. 425 U.S. at 770.

would prevail in the balancing process, because of some additional factor inherent in the speech sought to be regulated. Two of these categories are relevant to this discussion. The Court stated that deceptive and misleading advertising makes no valid contribution to a consumer's decisionmaking process and can properly be regulated.¹⁴⁸ The Court also noted that its decision did not deal with the electronic broadcasting media,¹⁴⁹ implying that governmental regulation of commercial speech broadcast over radio and television could be sustained in order to promote a reasonable government health or welfare interest.¹⁵⁰

A fiduciary relationship as here conceived between sellers (including broadcasters and advertisers) and their audience would not chill the First Amendment rights of the former even under *Virginia Citizens*. The seller's duties of fully and fairly disclosing all detriments in the product or service and of using non-manipulative advertising messages are meant to insure that children are exposed only to trustworthy, non-deceptive advertising from which to make an enlightened consumer decision. The application of the fiduciary doctrine furthers the consumer's right to know and is therefore in harmony with the policy justification the Court announced for extending First Amendment protection to commercial speech. When the interests of the children in receiving truthful product information and the state's interest in protecting children are balanced against the seller's right to disseminate advertisements without restriction, the Court would be likely to tip the scales in favor of the regulation. Moreover, because the fiduciary doctrine would only prevent unfair, exploitive speech, it could be sustained in light of the Court's affirmation of the regulations imposed on false advertising. The added fact that most advertising aimed at children is broadcast over the electronic media would also make that speech more susceptible to regulation.

As noted earlier, more far-reaching solutions to this exploitation than the application of a fiduciary relationship—such as banning advertising from children's television programs—have already been proposed.¹⁵¹ Given both the strong state interest in protecting children against harm of any sort and the Supreme Court's indication that regulations of commercial speech over the electronic media will be more readily sustained than other advertising, this solution may not be unreasonable. Therefore, the constitutionality of a

148. *Id.* at 771.

149. *Id.* at 773.

150. *See Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (1968), *cert. denied*, 396 U.S. 842 (1969).

151. *See* text accompanying note 33 *supra*. *See generally* J. Mander, *Suburbanization of the Mind: Why We Should Eliminate Television and How To Do It* (1975) (draft outline for a proposal to ban television altogether).

more conservative, less restrictive method of protecting children from commercial exploitation, application of the fiduciary doctrine, should be readily sustained by the courts.

Conclusion

Today, as never before, sellers of children's products are reaching out to exploit young, trusting children. The inequity of this relationship has been recognized by society, and fragmented attempts have been made to rectify the problem. However, piecemeal regulations, largely relying for their enforcement on a seller's voluntary compliance, have not proven to be an effective restraint. Sellers in a free enterprise society are understandably more motivated by their desire for profit than by an obligation to serve the public interest, and they show no signs of significantly altering their marketing practices without some legal mandate to do so. The law, which has traditionally afforded children special legal protection, can be effectively employed to protect children from the inequitable treatment they are experiencing at the hands of purveyors of children's products by recognizing a fiduciary relationship between sellers and children. Based on the firm public policy that shields children, this fiduciary doctrine would require that the seller deal with children with the utmost care and with their best interest affirmatively in mind. Extensive remedies for breach of the fiduciary duty would insure faithful compliance.

In 2250 B.C., the Code of Hammurabi made commercial dealing with a child without a contract or witnesses a crime punishable by death.¹⁵² Surely, our advanced society would not allow salespeople in a home for the mentally retarded or psychologically ill. At the least, society can legally identify the fiduciary relationship that exists between the seller and the vulnerable child. A sophisticated seller could easily be educated about his obligations under the fiduciary doctrine. Is it, then, too much to ask that he not abuse a child's wonderland?

Anon, to sudden silence won,
In fancy they pursue
The dream-child moving through a land
Of wonders wild and new,
In friendly chat with bird or beast—
And half believe it's true.

. . . .

Thus grew the tale of Wonderland,
Thus slowly, one by one,
Its quaint events were hammered out—
And now the tale is done.¹⁵³

152. G. DRIVER & J. MILES, *BABYLONIAN LAWS* 15 (1955).

153. L. CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (1946) (introductory poem).

